UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

DISTRICT HOSPITAL PARTNERS, L.P. D/B/A GEORGE WASHINGTON UNIVERSITY HOSPITAL, A LIMITED PARTNERSHIP, AND UHS OF D.C., INC., GENERAL PARTNER,	)	
and	)	CASE NOS. 05-CA-216482
	)	05-CA-230128
1199 SERVICE EMPLOYEES INTERNATIONAL UNION, UNITED HEALTHCARE WORKERS EAST, MD/DC REGION A/W SERVICE EMPLOYEES INTERNATIONAL UNION.	)	05-CA-238809

RESPONDENTS' REPLY BRIEF TO COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENTS' EXCEPTIONS

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District Hospital Partners, L.P. d/b/a The George Washington University Hospital, A Limited Partnership ("the Hospital" or "GWUH"), and UHS of D.C., Inc., General Partner ("UHS") (collectively, "Respondents"), by and through their undersigned attorneys and pursuant to Section 102.46 of the Board's Rules and Regulations, hereby file their Reply to Counsel for the General Counsel's ("CGC") Answering Brief to Respondents' Exceptions.[1]

A. Introduction: In this case, it is undisputed that a majority of employees expressed their personal decision not to be represented by the Union. CGC does not challenge this fact. However, CGC does challenge any attempt to honor the employees' choice, and bases this position on an argument that proposals during negotiations for a new contract rendered the employees incapable of making a free and informed choice. CGC makes this contention despite the fact that the Union waited years to engage in negotiations with the Hospital over a variety of proposals, and there is no record evidence present to establish causation.

B. Exceptions 1 and 2 (Rights and Duties of Managers ("MR"), No Strike, and Grievance & Mediation ("G&M"): CGC argues that this combination of proposals is unlawful because, "taken together," they required the Union to cede its representational responsibilities. (AB at 4-9.) All of the cases cited in support rely on the employer's *adherence* to untenable positions, and this is an important mandatory requirement for a finding of a violation. Without the crucial element of *adherence*, an 8(a)(5) violation could conceivably occur the second that certain proposals are passed across the table, regardless of the party's intent to only establish a starting point from which to otherwise negotiate the proposals. This cannot be and is not the case, and avoiding this ludicrous result is exactly why the Board requires that a union

[1] Due to page limits, the Hospital is unable to address all issues raised by CGC's Answer Brief, and as such, this Reply does not indicate agreement with CGC's positions or waive any defenses or arguments not included in this Reply. Herein, CGC's Answer Brief will be cited as "AB at [page number]."

affirmatively test an employer's willingness to bargain before finding a violation of the Act based on the mere presentation of proposals alone, as discussed in Section C, below.

C. Exceptions 5 and 6 (Union's Refusal to Bargain): Because the Union refused to test the Hospital's willingness to negotiate, CGC consistently refers to purported "verbal counters" from the Union to fill the void created by years of inaction during which the Union did little more than "play possum" instead of engaging in the give and take of bona fide bargaining. *See, e.g.,* AB at 27-28. However, none of these "counters" were in fact genuine counters.[2]

1. Grievance and Mediation: CGC claims the Union made a "verbal counter" that was "rejected" by the Hospital on April 5, 2017. (AB at 27 (citing "R. Ex. 3 at 181-203, 220-230").) In truth, the Hospital made its initial **G&M** proposal on March 29, but it was not discussed because the Union "threw [the Hospital] out of the room." (Tr. at 51:23-52:5; R. Ex. 3 at 179-180.) The Hospital tried again to explain the initial proposal during the next session on April 5 (R. Ex. 3 at 0184-0187), a day in which CGC improperly claims the Union "orally countered" (AB at 5 (citing to "R. Ex. 3 at 181-203")). In fact, the final exchange on the proposal that day consisted of Bernstein urging the Union to do so without success by telling Godoff "You are always welcome to counter" (R. Ex. 3 at 186), and Godoff responding, "We will; part of negotiations" (*Id.*). As part of his regular review of outstanding proposals on May 16, Bernstein noted, "I'm trying to recall what you tendered if anything; I don't think we have that from you. The union's position is content with current language" (R. Ex. 3 at 221), with Godoff responding at the end of that same session, "Let's get some more written responses besides what we talked about" (R. Ex. 3 at 230). This exchange falls woefully short of the "verbal counter, rejected by

[2] While verbal proposals are of course permitted under the Act, when the parties have agreed to a course of conduct, such as reducing written proposals to writing, this guides the negotiations and reasonable expectations of the parties.

Respondent" as characterized in CGC's Answer Brief. (AB at 27.) It is further clear that the Union knew it owed a written counter because it finally tendered one on September 5, 2018 (R. Ex. 2 at 3813-3815), it's first and only one on the subject.[3] On that date, CGC contends Respondent "would not agree to any portion of the Union's grievance and arbitration proposal" (AB at 6), another gross distortion of the record as (a) the Union's counter was nothing more than a League Proposal[4] photocopied from another, non-applicable CBA (R. Ex. 2 at 3813-3815), and (b) on October 10, after multiple discussions about the League Proposal wherein the Hospital pointed out irregularities in it and tried to understand how it would apply at GWUH, Godoff admitted it needed "modification" in order to work for the Hospital (R. Ex. 3 at 402).

2. No Strike: CGC claims the Union made a "verbal counter" that "verbally reject[ed]" the Hospital's proposal "as unlawful" on March 29, 2017. (AB at 27 (citing "Tr. 51:16-25, 120:3-10").) In truth, the Hospital's proposal was presented on March 29, and the contemporaneous notes from the discussion demonstrate Godoff made the following comments:

- "We'll take a look at this document; not sure if we are prepared to bargain" (R. Ex. 3 at 0175);
- "Again, I don't know; [the proposal] may simply clarify responsibilities" (*Id.*);
- "Not saying they are not serious proposals" (R. Ex. 3 at 0176); and
- "We are not going to participate, if you can't persuade us that these are issues that need to be addressed; don't think ever had picket line labor dispute" (*Id.*).

On April 5, Bernstein again took the opportunity to explain the proposal (R. Ex. 3 at 0187-0188); without any substantive Union response (*passim* at R. Ex. 3 at 0181-0203). Godoff's only

[3] The Hospital did update its **G&M** proposal on May 25, 2017 via e-mail, to correct a reference from "verbal" to "documented verbal." (RESP Ex. 1 at 03627, 03632.)

[4] CGC inexplicably claims that the League Proposals were "pulled" from a CBA "between the Union and a hospital in Boston also owned by GWUH's parent company." (AB at 20, fn. 15 (citing "Tr. 84:3-11").) This is simply wrong. The cited testimony relates to the fact Godoff understood that the Hospital's parent company had previously agreed to union security with SEIU at a facility in Boston. The League Proposals were an entirely different animal, lifted from a contract SEIU had with a group of New York hospitals entirely unrelated to Respondents. (R. Ex. 3 at 0363; Tr. at 140:9-22, 158:11-14.)

testimony consistent with the bargaining notes and the Union's course of conduct is at Tr. 120:3-10 where he admits he never responded to the **No Strike** proposal (despite CGC's contention otherwise) because "there was no response necessary."

3. Management Rights: Here, CGC incorrectly asserts that the Hospital verbally rejected the Union's September 5, 2018 League Proposal. (AB at 27.) In truth, while the Hospital certainly explained to the Union that it was rejecting the proposal because it did not apply and bore no resemblance to existing contract language or the Parties' prior proposals (R. Ex. 3 at 0386), CGC completely ignores the fact that the Hospital actually presented its counter *in writing*, consistent with the Parties' course of conduct (R. Ex. 1 at 3676-3677).

4. Union Security: The Hospital agrees the Union verbally rejected the proposal on April 5, 2017 (R. Ex. 3 at 0181-0183), and in accordance with the Parties' course of conduct, provided a one word written counter ("REJECT") on April 6 (R. Ex. 2 at 3771). The Union never made a substantive counter until tendering its League Proposal on September 5, 2018. (R. Ex. 2 at 3818). CGC declares that on October 10, 2018 "Respondent refused to further discuss union security, referring the Union to its prior proposal." (AB at 20 (citing "R. Ex. 3 at 0403").) According to the bargaining notes, however, the Parties were reviewing the status of all open proposals, as they did at the end of nearly every session (kicked off by Bernstein asking, "What's outstanding?"), when Bernstein said, "Union security, you know what our proposal is." In response Godoff stated, "That one is a tough nut, one that the hospital cares [about]." (R. Ex. 3 at 0403.) This is hardly a "refus[al] to further discuss union security." (AB at 20.)

5. Wages: CGC claims the Union made a "verbal counter" on May 21, 2018 (citing "Tr. 69:20-24"), that the Hospital "countered" that same day (citing "GC Ex. 19"), with the Union then providing a "verbal response" between "May 18-October 11, 2018" (citing "R.

Ex. 3 at RESP 0301-0412"). (AB at 28.) These machinations are an attempt to obscure the fact that the Union continuously failed to respond to the Hospital's May **Wages** proposal all the way through the time of the October withdrawal of recognition. The Union did not provide a "verbal" (AB at 28) or written counter (AB at 14[5]) on May 21, as alleged by CGC. Instead, the Hospital simply provided the "Appendix B" it had promised to produce during discussions on May 18 (R. Ex. 3 at 0314) and at the very start of the session, before any substantive discussion, on the morning of May 21 (R. Ex. 3 at 0306, 0314); as such, CGC's attempt to cast one sentence of Godoff's self-serving testimony as a "counter" "rejected" by the Hospital via its May 21 production of Appendix B must be rejected.[6] Godoff's claim at the hearing that he made an "oral" proposal is belied by the bargaining notes, as it is clear that on May 18 and 21, the Union is merely asking questions about the Hospital's initial **Wages** proposal, and the Hospital is explaining its proposal and answering the questions.[7] In fact, while waiting for Appendix B and after asking his question about negotiating ranges, Godoff stated, **"I don't know how we are going to respond."** (R. Ex. 3 at 0311.) Later that afternoon, upon receiving Appendix B, Godoff noted, **"It may very well be that we don't have a complaint with it, but this is [a] complicated process."** (R. Ex. 3 at 0318.) Further, during the May 21 session, both Bernstein and Schmid repeatedly emphasized that they were seeking a counter from the Union (belying any

[5] CGC cites to G.C. Ex. 19 as support for its contention that the Union presented a written counter on May 21; however, G.C. Ex. 19 is *the Hospital's* written **Wages** proposal. As outlined herein, the Union never submitted a counter, verbal or written, to the Hospital's **Wages** proposal.

[6] In fact, Godoff himself did not even cast the discussion as a counter, and it is simply a fictionalized interpretation by CGC. Godoff's exact testimony was that (a) he "can't even remember the meetings [after May 18]" (Tr. at 69:8-14), (b) he "thinks" pay may have been discussed (*Id.*) and (c) the conversation (that he "thinks" happened) was "explor[ing]" the proposal (Tr. at 69:20).

[7] For example, Schmid's comment that the ranges would not be negotiated year-to-year, correctly explained the proposal that had been made; it was not a commentary on a counter from the Union, because the Union never made any counter at all. (*See, e.g.*, R. Ex. 3 at 0307.)

assertion that they had received one that morning). *See, e.g.,* R. Ex. 3 at 0310 (Schmid telling the Union "well then counter"), 0311 (Bernstein stating, "we will accept a counter").

On one hand, CGC argues that the Union lacked sufficient information to formulate a counter due to the Hospital's "delay" in providing it (AB at 33-34). On the other, CGC, claims that the Union countered the **Wages** proposal both in writing (AB at 14) and verbally (AB at 28). Obviously, these contentions cannot co-exist. In truth, the Union had possessed the Hospital's initial **Wages** proposal since May 2018 (R. Ex. 1 at 3640, 3641-3643) and the YOE data that specifically outlined employee placements in the ranges as of August 1, 2018 (R. Ex. 3 at 0351-0352 (on August 1, Schmid reviewing how to read the spreadsheet using committee member Bey, who was awarded 20.63 YOE, as an example, and Barner stating she understood the explanation)). Placements in the ranges were also subject to negotiation, with Bernstein and Schmid notifying the Union the Hospital would consider all information regarding individual employee placements. *See, e.g.,* R. Ex. 3 at 0352 (Bernstein stating, "We're willing to review anything the employee or you all present to us that suggests our [YOE] calculations were off"); R. Ex. 3 at 0401-0402 (confirming Hospital will review any YOE information); Tr. at 605:5-24).

Finally, CGC makes much of the fact that the Hospital explained that the non-discretionary 2% floor for the Wage proposal was contingent on agreeing to merit. *See, e.g.,* AB at 15, 18-19.) This does not establish that "Respondent was not willing to consider a wage increase for the Unit at all unless the Union would agree to Respondent having discretionary control …" (*Id.*) It simply means that the Hospital was not agreeable to a floor of 2% if the Union was going to only accept an ATB, which is exactly what the Union said was its position (*see, e.g.,* R. Ex. 3 at 0331-0332).

The Union failed to make any effort to negotiate the very proposals it subsequently characterized as an "unlawful combination." *Audio Visual Services Group, Inc.*, 367 NLRB 103 (2019) ("*PSAV*") holds that such nonfeasance cannot be rewarded, and warrants specific discussion due to CGC's strained effort to distinguish the opinion. Every Section 8(a)(5) case rests on different facts, as no course of negotiations takes the same path. As such, an analysis of bad-faith bargaining cases will never be an apples-to-apples comparison. However, the primary holding of *PSAV* – that the Board will not make a finding of bad-faith bargaining where the union fails to test the employer's willingness to negotiate – is applicable to a broad range of factual scenarios, including this one. CGC repeatedly references movement by the employer in *PSAV* as well as some agreement between the parties, but it is undisputed that the employer in that case was only able to respond because the union was engaging in negotiations that allowed for the parties to reach agreement prior to the time the union walked away from the table. *Id.* at p. 1 (Union provided a complete contract proposal on July 19, 2016), p. 2 (Union provided modified economic and discipline proposals on August 18), p. 3 (Union provided a partial contract proposal that included wages, benefits, discipline, grievance and arbitration and subcontracting on September 13), p. 4 (Union provided a partial contract proposals that included discipline, grievance and arbitration, and subcontracting on January 24). Notably, even the union's level of involvement in *PSAV* – which far exceeded the Union's here -- was not enough, as the 8(a)(5) charges were dismissed. *Id.* at p. 9.

Had such engagement occurred here, negotiations undoubtedly would have proceeded much differently. For example, CGC ignores the Union's concession that the Hospital was negotiating **Discipline**, a proposal the Union actually countered, and making significant concessions as discussions continued. (Tr. 45:3-17 (Godoff admitting concessions by Hospital);

see also 48:14-21, 81:18-22, 118:10-21). In fact, both the Union and the Hospital continued to move toward agreement on this proposal, exchanging counters on **Discipline** all the way up to the last bargaining session on October 11, 2018. (R. Ex. 2 at 3824-3826; R. Ex. 1 at 3693-3695.)

CGC suggests that prior to the Union's initial charge on March 12, 2018, "Respondent had adhered to its no arbitration proposal since April 5, 2017, it's no strike proposal since March 29, 2017, and its management rights proposal since December 6, 2016." (AB at 31.) That sentence should more accurately state, "prior to the Union filing its initial charge on March 12, 2018, the Union had failed to counter the Hospital's no arbitration proposal since March 29, 2017, the Hospital's no strike proposal since March 29, 2017, and the Hospital's management rights proposal since March 28, 2017," as the Union did not respond to **G&M** and **MR** until it passed League Proposals on September 5, 2018, with the Hospital withdrawing **No Strike** without a counter on June 7, 2018.

D. Exceptions 8 and 9 (A Correction is not Regressive): CGC contends, repeatedly, that the reference to "arbitration" in the Hospital's **Discipline** proposal was "not a mistake" (AB at 23, 26), and was not resolved by the Hospital at the April 5 bargaining session (AB at 24). This is simply a misstatement of the record. In truth, Bernstein immediately acknowledged the mistake on April 5, as admitted by the Union (but apparently ignored by CGC). (Tr. at 81:23-82:15 (Godoff admitting that when he raised the issue in April, Bernstein "owned there was an issue"); R. Ex. 3 at 0187 (on April 5, Bernstein stating, "Error; replace with mediation procedure."); *see also* Tr. at 555:24-556:11.)

CGC's flippant characterization of the Hospital's argument that its **Discipline** proposal was not intended to be a dispute resolution proposal, as "nonsensical" (AB at 24), belies the fact that it was both logical and the truth. The Hospital contends simply that it had not formulated its

dispute resolution proposal at the time it made its **Discipline** proposal, and once it did, that created a discrepancy with the earlier **Discipline** proposal that needed to be, and was, corrected. (Tr. at 554:24-555:11 (Bernstein explaining that he had not yet prepared a dispute resolution proposal), 559:4-9.) Further, CGC completely ignores two very important facts: (a) significant items, including just cause, remained unresolved, and as such, (b) there was no TA on **Discipline** at the time of the correction. CGC's argument that the Hospital's correction was "unexplained" and "regressive" (AB at 26) is simply not supported by the record and must be rejected.

E. Exceptions 11 and 12 (Master Slack): The ALJ and CGC rely heavily on the timing of the last one-third of the signatures on the Petition to demonstrate a causal connection between the Hospital's allegedly unlawful conduct at the bargaining table and employee disaffection. However, this ignores the Union's own conduct during this same time period, shifting blame to a perfectly legal and accurate Bargaining Brief for the purported "stampede" of signatures. Notably absent from the ALJ's decision and CGC's Answer Brief is an acknowledgment that on September 5, 2018, after years of protracted delay on multiple proposals, the Union presented five proposals photocopied from another contract that bore no resemblance to the expired GWUH CBA and which failed to take into account or reflect the employees of GWUH (R. Ex. 2 at 3811-3817), **a fact admitted by the Union**. *See, e.g.,* R. Ex. 3 at 0363 (Esders admitting there was "going to be some work to tailor [the League Proposals] to GWUH"); Tr. at 140:23-141:6; Tr. at 158:11-22 (Barner admitting there had not been any modifications made to the League Proposals to tailor them for GWUH and that it all did not fit for GWUH).) Further, the Union failed to take any measures to correct or tailor the proposals upon reconvening for bargaining in October, and it still had not tendered a **Wages** counter at that time. If one feels compelled to make conjectural assumptions without record support, then it

seems just as likely that the employee disaffection was engendered by the Union's own nonfeasance during the late stages of negotiations.

F. Exception 14 (Credibility determination): While the ALJ may have attributed his credibility determination about Schmid to the December 11, 2016 e-mail at G.C. 36 and "other salient facts" (JD at 31 at fn. 82; *see also* JD at 10:5-8), his citations in support only go to the record discussion of G.C. 36 and relatedly, the date Schmid first learned of the Petition (*Id.*). Further, CGC relies on that e-mail to find that "Respondent was well aware of the disaffection petition as early as December 2016." (AB at 46.) The record, however, is bereft of any evidence whatsoever regarding the actual meaning of this e-mail – Alicia Brill (the sender) did not testify, nor did any of the recipients. The only fact in the record is that Schmid never saw the e-mail. This unsupported conclusion that the e-mail somehow establishes Respondents' knowledge of the Petition at issue years before it was presented is a gross mischaracterization of the evidence, improper, and indicative of a biased interpretation of the actual record.[8]

G. Exception 16 and 17 (Extraordinary Relief): Not even CGC could muster up support for the ALJ's "minimum frequency" remedy compelling bargaining for a minimum of 15 hours per week, with mandatory written bargaining progress reports every 15 days. (AB at 48-50 (no mention of "minimum frequency" component).) That is because it is grossly excessive, punitive, and unsupported by the facts and law, and must therefore be rejected in favor of no bargaining order at all.

WHEREFORE, Respondents respectfully submit that the ALJ's findings should be reversed in their entirety.

[8] This is especially true when the record *does* establish that (a) the Security employees chose to decertify their union (possibly in February 2017) (Tr. at 528:7-16), and (b) the earliest signature on the Petition at issue is March 2018 (R. Ex. 7 at 418), 15 months after the e-mail in question.

Submitted this 27th day of November, 2019:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was filed electronically with the National Labor Relations Board at www.nlrb.gov, and duly served electronically upon the following named individuals on this 27th day of November, 2019:

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